

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

)
Amendment to Parts 2, 15, and 97 of the)
Commission's Rules To Permit Use of)
Radio Frequencies Above 40 GHz for)
New Radio Applications)

ET Docket No. 94-124
RM-8308

)
International Harmonization of Frequency)
Bands Above 40 GHz)

)
Petition of Sky Station International, Inc.,)
For Amendment of the Commission's)
Rules To Establish Requirements for a)
Global Stratospheric Telecommunications)
Service in the 47.2-47.5 GHz and)
47.9-48.2 GHz Frequency Bands)

RM-8784-

)
Amendment to Part 27 of the)
Commission's Rules To Revise Rules)
for Services in the 2.3 GHz Band and)
To Include Licensing of Services)
In the 47 GHz Band.)

WT Docket No. 98-136

COMMENTS OF RAND McNALLY & COMPANY

Rand McNally & Company ("RMC") hereby submits the following comments in response to the Memorandum Opinion and Order on Reconsideration and Notice of Proposed Rulemaking released on July 29, 1998, in the above captioned proceeding ("Notice"). RMC's comments address the following two points.

First, as the Commission has recognized, RMC is the copyright owner of the MTA/BTA listings.¹ Neither the Commission nor any of its licensees may make use

¹ See Notice, ¶ 83 n.132; see also, e.g., Report and Order and Second Notice of Proposed Rule Making, Amendment of Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, 12 FCC Rcd. 18600, 18610 n.32 (1997) ("39 GHz Order"); Report and Order, Amendment of Parts 21 and 74 of the Commission Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, 10 FCC Rcd. 9589, 9608 (1995) ("MDS Order").

of the MTA/BTA geographic boundaries in connection with the licensing or use of the 47 GHz band without RMC's consent.

Second, the above restriction on use applies both to initial licensing in the 47 GHz Band and any subsequent licensing that may occur by partitioning or otherwise with respect to the 47 GHz Band or any other service or frequency for which no RMC copyright license has been issued. Accordingly, the partitioning rules that the Commission proposes to employ for licensing in the 47 GHz Band should be modified so as not to employ, or purport to authorize Commission licensees to employ, the MTA/BTA listings for the partitioning of licenses that are not subject to any RMC copyright licensing agreement.

I. THE COMMISSION MAY NOT USE THE MTA/BTA LISTINGS FOR LICENSING THE 47 GHZ BAND WITHOUT RMC'S CONSENT.

In the instance Notice, while the Commission now proposes to use U.S. Department of Commerce REAG and MEA geographic listings, it also asks for comment as to the use of the MTA/BTA Listings for licensing in the 47 MHz Band. As to such alternative, RMC wishes to reiterate, as it has already made clear to the Commission in its "Comments" on the Commission's previous Notice of Proposed Rulemaking in this proceeding (which comments are attached hereto for reference),² that the Commission may not use the MTA/BTA Listings for licensing in the 47 GHz Band without RMC's consent.

Accordingly, absent an agreement authorizing the Commission and its licensees to make use of the MTA/BTA Listings for this purpose, the Commission should not employ them for 47 GHz Band licensing. To do otherwise would constitute an infringement of RMC's copyright, both directly by the Commission's use, and indirectly by encouraging licensees in the Band to infringe on RMC's property right.

² See Comments of RMC (January 20, 1995).

II. THE COMMISSION MAY NOT MAKE USE OF MTA/BTA LISTINGS FOR LICENSE PARTITIONING IN THE 47 GHZ BAND (OR FOR OTHER PART 27 WCS LICENSES) AND IT HAS NO RIGHT OR AUTHORITY TO PERMIT OTHERS TO DO SO.

Just as the Commission has no right to employ the MTA/BTA Listings for issuing initial licenses in the 47 GHz Band, it has no such right to use, or to permit its licensees to use, such Listings for the partitioning of 47 GHz Licenses. The licensing agreements under which the Commission (and others) have been issued authority to employ the MTA/BTA Listings have been clearly limited to specific licensed services and frequency bands and specifically do not include 47 GHz licenses. These agreements do not in any way permit or suggest that these Listings may be used by the Commission or its licensees for other services, a limitation that the Commission has recognized on several occasions.³

Accordingly, Section 27.15 of the Commission's rules regarding partitioning, which the Commission proposes to modify and employ for 47 GHz Band licenses, should be further amended to change clause (b) of that rule so as not to purport to authorize licensees to use the MTA/BTA Listings for partitioning, at least in the absence of a license agreement with RMC that authorizes such use.

There is already precedent for the Commission's making the proposed rule change. Thus, comparable language to that which now appears in Section 27.15(b) was originally adopted by the Commission for its rule (Section 90.365(b)) governing the partitioning of AVM licenses.⁴ Later, however, apparently recognizing the problems of infringement, the Commission modified this provision to delete reference to the MTA/BTA Listings and other "FCC recognized service areas."⁵ That same approach can and should be followed here.⁶

³ See, e.g., 39 GHz Order, 18612; MDS Order, 9609.

⁴ Second Report and Order, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61 (July 14, 1998) (the "AVM Order") Appendix C.

⁵ Erratum to AVM Order, *supra* (July 20, 1998).

⁶ For the avoidance of doubt, while RMC obviously has no objection to partitioning along county lines, RMC would regard any licensee's effort to partition based upon the compilation of counties that are reflected in the MTA/BTA Listings as an infringement.

RMC further urges that, in the interim, while the Commission is considering rules in this docket, the Commission should issue an erratum to its Part 27 rules (as it did with the AVM rules) to avoid further infringement of RMC's copyright. When the Part 27 rules were proposed the Commission expressly noted that "a license agreement with Rand McNally would be necessary" for their use in connection with this service. Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), Notice of Proposed Rule Making, 11 FCC Rcd. 21713 at 21720-21721 (1996). The Commission subsequently determined not to employ the MTA/BTA listings for initial licensing. Report and Order, 12 FCC Rcd. 10785 at 10814 (1997). It only recently came to the attention of RMC, however, that, without the agreement or authorization of RMC, the Commission adopted the use of these listings for partitioning. Id. at 10837. While RMC regrets not calling this problem to the attention of the Commission earlier, the fact remains that the existing rule employs RMC's copyrighted listings without authorization.

RMC remains willing to license the use of MTA/BTA Listings on reasonable terms, but it will not permit its property to be appropriated without just compensation and due process of law, and will take all necessary steps to remedy any unauthorized exercise of its copyright by the Commission or any other party.

III. CONCLUSION.

The Commission has no right nor authorization to use, or encourage others to use, the MTA/BTA Listings for licensing, initial or subsequent partitioning, of 47 GHz or any other Part 27 WCS licenses. Absent a license agreement permitting such use, the Commission should refrain and cease and desist from infringing upon these rights.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of

Amendment of Parts 2 and 15 of the
Commission's Rules To Permit
Use of Radio Frequencies Above
40 GHz for New Radio Applications

ET Docket No. 94-124
RM-8308

COMMENTS
OF RAND McNALLY & COMPANY

Rand McNally & Company ("RMC") submits these Comments in response to the Notice of Proposed Rule Making of the Commission in this proceeding, adopted October 20, 1994 and released November 8, 1994 ("Notice").

RMC is the copyright owner of the MTA/BTA Listings, embodied in its Trading Area System MTA/BTA Diskette, and graphically represented in its Commercial Atlas & Marketing Guide (the "MTA/BTA Map"). We understand that certain parties with an interest in this proceeding are urging, and the Commission is proposing, mandating use of RMC's MTAs as geographic boundaries for service areas for licensing Licensed Millimeter

The MTA/BTA Listings and the MTA/BTA Map will be referred to collectively as the "MTA/BTA Listings."

Wave Services ("LMWS"). We submit these Comments to assert our strong objection to any attempt to make RMC's MTAs or BTAs the geographic boundaries for licensing LMWS, without a license from RMC.

I. RMC HAS NOT LICENSED USE OF ITS MTA/BTA LISTINGS IN CONNECTION WITH LMWS.

The MTA/BTA Listings are valuable intellectual property. RMC has made substantial investment in their development.

RMC has *not* licensed the MTA/BTA Listings in connection with LMWS. To date, RMC has licensed use of its MTA/BTA Listings for use only in connection with the following services:

(i) 2 GHz broadband Personal Communications Services ("PCS"), as authorized in GEN Docket 90-314 or any successor proceedings;

(ii) 900 MHz narrowband PCS, as authorized in GEN Docket No. 90-314 and ET Docket 92-100 or any successor proceedings;

(iii) 800 MHz wide-area Specialized Mobile Radio Services or Expanded Mobile Service Providers, as authorized in PR Docket No. 93-144 or any successor proceedings; and

(iv) Local Multipoint Distribution Services, as authorized in CC Docket No. 92-297 or any successor proceedings.

The existing license came about after RMC learned, in late 1993, that the Commission was considering use of its MTAs and BTAs as the geographic boundaries for certain types of personal communications services. We objected, explaining that the

Commission could not adopt these boundaries without RMC's consent, as the MTA/BTA Listings are protected by copyright and such action would constitute an unlawful taking of RMC's property.

Subsequently, RMC was approached by PCIA, the Personal Communications Industry Association. PCIA sought, and RMC granted, a blanket license so that all parties with an interest in the FCC proceedings specified in the license would be permitted to reproduce and use the MTA/BTA Listings *only in connection with those proceedings*, subject to the terms of the license. The license made the MTA/BTA Listings available in various forms to the Commission and to interested parties either directly from RMC, or indirectly through its licensees under the license.

We advised the Commission of our license agreement with PCIA, and of our consent to use of the MTAs and BTAs in the proceedings specified in the agreement, but only in those proceedings. We indicated then that we were willing to license use of the MTAs and BTAs on reasonable terms for use in other proceedings, if the parties with an interest in those proceedings sought such a license.

Since that time, the Commission mandated use of RMC's MTAs as the geographic boundaries for 900 MHz specialized mobile radio ("SMR") services. In connection with such mandate, the Commission expressly recognized RMC's copyright rights in the

MTA/BTA Listings, and that RMC's license with PCIA extends only to certain services.² Although RMC assumed that the Commission did not intend to proceed with such mandate without RMC's assent, RMC objected on the record to such use in the absence of an MTA/BTA license obtained from RMC. Subsequently, RMC was approached by AMTA, the American Mobile Telecommunications Association, and AMTA and RMC are in the process of negotiating the terms of a second blanket license agreement that would allow specified use of the MTA/BTA Listings by persons interested in certain Commission proceedings in connection with 900 MHz SMR. As the Commission has been advised, an important element and prerequisite of this blanket license agreement is the Commission's acknowledgement that it will include in its 900 MHz technical Order language notifying potential 900 MHz SMR grantees that they must comply with the terms of such blanket license agreement (or any alternative license obtained from RMC) and may not rely on the grant of an MTA-based SMR license from the Commission as a defense to any claim of copyright infringement brought by RMC against such grantee. RMC is hopeful that its negotiations with AMTA will conclude in the execution of a blanket license agreement that balances the legitimate interests of RMC in protecting its copyright rights with the interests of the Commission and potential 900 MHz SMR grantees.

² *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Third Report and Order (adopted August 9, 1994; released Sept. 23, 1994) at 57 n. 197, 64 n. 218.

II. THE COMMISSION MAY NOT MAKE MTAs THE GEOGRAPHIC BOUNDARIES FOR THE LMWS SERVICES WITHOUT RMC'S CONSENT

The Commission has proposed in its Notice that RMC's MTAs should serve as the geographic boundaries for the LMWS services, even though RMC has not licensed use of the MTA/BTA Listings in connection with these services. In so doing, the Commission recognized RMC's copyright in the MTA/BTA Listings, noted that these services were not covered by the existing PCIA license, and encouraged interested parties and RMC to explore the extension of a license to cover the proposed LMWS.¹ Notice at 11-12 n. 28.

We appreciate the Commission's recognition of our copyright rights, and its suggestion that the parties explore a license. Nevertheless, the Commission skirted a fundamental issue in failing to acknowledge that use of the MTAs for this purpose requires RMC's consent, and has thereby made it easy for the parties to disregard the Commission's suggestion and RMC's rights. We want to make it clear that we strenuously object to use of our MTA/BTA Listings unless and until an appropriate license is entered.

The Commission has no authority to proceed without RMC's consent. The MTA/BTA Listings represent a significant investment on RMC's part. RMC did not seek to have the MTAs or BTAs used as the geographic boundaries for communications services. If the Commission mandates use of the MTAs and BTAs absent a license by RMC, it will amount to an unlawful taking of RMC's property. All parties to the relevant proceedings,

¹ Note that LMWS services will *not* be covered under the proposed blanket license with AMTA.

and anyone with an interest therein, will contend that they may reproduce, adapt, and distribute the MTA/BTA Listings and MTA/BTA Map, effectively removing the copyright protection from these works. Moreover, the Commission will itself be an infringer of copyright.

We urge the Commission not to adopt BTAs as the geographic boundaries for licensing LMWS services and, indeed, not to adopt MTAs or BTAs as the geographic boundaries for any other services not covered by an existing RMC license, until an applicable license from RMC has been obtained. We also urge the Commission to make it clear to its potential LMWS grantees that unless the grantee obtains a license from RMC (whether pursuant to a blanket license agreement or other negotiated agreement), it may not rely on a grant of an MTA-based LMWS license from the Commission as a defense to any claim of copyright infringement brought by RMC against it. If the parties are unwilling to enter into a license with RMC, then the Commission should select different geographic boundaries for the LMWS services.

We remain willing to license use of the MTA/BTA Listings on reasonable terms so that all parties affected by and interested in Commission proceedings may reproduce, modify and distribute them. But RMC will not permit its property to be appropriated without just compensation and due process of law, and will take all necessary steps to remedy any unauthorized exercise of its copyright rights by the Commission or any other party.

III. CONCLUSION

We urge the Commission to refrain from jeopardizing RMC's copyright rights. The Commission should not mandate RMC's MTAs or BTAs as geographic boundaries for licensing LMWS services or for any other service not covered in advance by a license from RMC. If the parties are unwilling to enter a license, the Commission should select alternative geographic boundary definitions. We also urge the Commission to make it clear to its potential LMWS grantees that unless the grantee obtains a license from RMC (whether pursuant to a blanket license agreement or other negotiated agreement), it may not rely on a grant of an MTA-based LMWS license from the Commission as a defense to any claim of copyright infringement brought by RMC against it.

Respectfully submitted,

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